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May 11, 2022

**VIA ECF**

David J. Smith  
Clerk of Court  
U.S. Court of Appeals for the Eleventh Circuit  
56 Forsyth St., N.W.  
Atlanta, Georgia 30303

Re: Norwegian Cruise Line Holdings Ltd., et al. v. State Surgeon General, No. 21-12729

Dear Mr. Smith:

Appellees respectfully respond to Appellant's 28(j) letter dated May 6, 2022.

To the extent that The Bahamas and U.S. Virgin Islands have revised their vaccination requirements (as Appellant submits in disregard of persisting official statements by The Bahamas), that cannot alter the basis for the preliminary injunction. The court below correctly anticipated that such requirements would be imposed, as they concededly were. Assuming arguendo those requirements were later relaxed, the shifting regulatory landscape confirms that the court was correct to find, as it did in August 2021, "myriad, rapidly-changing requirements regarding quarantining and testing"—with "documentary proof of vaccination" being the "one constant that facilitates cruise line customers' access to advertised ports of call." App. 539.

Regent Seven Seas Cruises and Oceania Cruises continue to require documentary proof from everyone. Although Norwegian Cruise Lines no longer requires vaccination for children under 12, it made this change based on recent data while maintaining a 95% vaccination rate—which would be undermined absent proof. In any event, if Appellant contends that changed circumstances warrant modifying the injunction, then Appellant should so submit below; this appeal is confined to the record available when the preliminary injunction issued. *United States v. Carroll*, 2021 WL 4860928, at \*1 n.1 (11th Cir. Oct. 19, 2021) (quoting *Smith v. United States*,

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343 F.2d 539, 541 (5th Cir. 1965)); accord *Porretti v. Dzurenda*, 11 F.4th 1037, 1052 (9th Cir. 2021); *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1240 n.1 (10th Cir. 2017).

Nor does *City of Austin v. Reagan National Advertising of Austin, LLC*, No. 20-1029 (Apr. 21, 2022), alter anything. Far from revisiting the contours of commercial-speech doctrine, the passages Appellant cites reference the doctrine only in passing *dicta*. What *City of Austin* underlines is that “regulations that discriminate based on ‘the topic discussed or the idea or message expressed’ [] are content based.” Slip op. at 10. It follows that Florida’s ban is content based; even if analyzed as regulating purely commercial speech, however, it cannot withstand intermediate scrutiny. Pls.-Appellees’ Br. 25-26, 29-30.

Respectfully submitted,

/s/ Derek L. Shaffer

Derek L. Shaffer

*Counsel for Plaintiffs-Appellees*